

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 27, 2024

CASE: 2023-00501N

Citation: Edwards v. Halton Condominium Corporation No. 192, Talsky, 2024 ONCAT 176

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Nicole Aylwin, Member

The Applicant,

Susan Edwards

Represented by Michelle Kelly, Counsel

The Respondent,

Halton Condominium Corporation No. 192

Represented by Katya Ukrainetz, Counsel

Steven Talsky

Represented by Greg Marley, Counsel

Hearing: Written Online Hearing – June 12, 2024, to November 20, 2024

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Susan Edwards and the Respondent, Steven Talsky, own adjacent units in the Respondent condominium, Halton Condominium Corporation No. 192 (“HCC 192”). Ms. Edwards alleges that cigarette smoke and odour from Mr. Talsky’s unit is causing a nuisance and is substantially interfering with her enjoyment of her unit and the common elements. She further alleges that HCC 192 has failed to fulfil its obligations under the *Condominium Act, 1998* (the “Act”) to take all reasonable steps to ensure that all owners and occupiers comply with the condominium’s governing documents and the Act. Ms. Edwards has asked that the Tribunal order Mr. Talsky and all occupants of his unit to cease all smoking activities in the unit, and for HCC 192 to enforce its Tobacco Restrictions and Nuisance Rules (“Smoking Rules”), which allow the board to require a unit owner to cease smoking in their unit if the board determines the smoke from the unit is

causing a nuisance. Ms. Edwards also seeks an order of costs against HCC 192.

- [2] There is no dispute that there is smoking taking place in Mr. Talsky's unit. Mr. Talsky's wife is a smoker who, according to Mr. Talsky, smokes approximately 15 cigarettes a day and has done so since they moved into the building in 2012. At that time and at the time this application was made, HCC 192 did not prohibit smoking in individual units. However, Mr. Talsky disputes that smoke and odour from his unit are the sole or primary source of the smoke and odour bothering Ms. Edwards. Accordingly, he asserts his unit is not causing a nuisance in the form of smoke and odour and that there is no basis for HCC 192 to enforce the Smoking Rules. Mr. Talsky asks that the application be dismissed, with costs awarded to him.
- [3] HCC 192 takes the position it has taken all reasonable steps to investigate Ms. Edwards complaints and enforce its Smoking Rules and the Act. It asks that this application be dismissed with costs in its favour.
- [4] The dispute between the parties is longstanding, dating back to 2012. The evidence shows that this extended period of conflict has led to escalating frustration, animosity, and suspicion between the parties, which at times complicated this hearing. It resulted in the parties making several accusations against each other that circle the borders of this dispute but are not relevant to the issues I must decide. These include the accusations that a small group of unit owners (which includes the Applicant and other witnesses) are attempting to use this case to make HCC 192 into a non-smoking building and that some HCC 192 board members (now former board members) have breached the board's Code of Ethics and/or acted in ways that are in a conflict of interest or otherwise unethical. I will not address these issues in my decision. The only issues to be address in this hearing are those that were set out with the parties at the outset of this hearing, specifically:
 - 1. Is the smoke and odour coming from Mr. Talsky's unit unreasonable resulting in a nuisance, annoyance or disruption to Ms. Edwards as per s. 117(2) of the Act?
 - 2. Has HCC 192 fulfilled its obligations under the Act in its response to the concerns expressed by the Applicant about nuisance smoke and odours?
 - 3. If the smoke and odour is found to be a nuisance, what is the appropriate remedy?
 - 4. Should HCC 192 be required to enforce Rule 7(c) ii of its Smoking Rules

against Mr. Talsky?

5. Is any party entitled to costs? If so, what amount?

[5] In making my decision, I have reviewed all the submissions and evidence provided to me, but only refer to those that are necessary to make my decision.

[6] For the reasons set out below I find that, on the balance of probabilities, Mr. Talsky's unit is the source of smoke and smoke odour experienced by Ms. Edwards, and that the smoke odour is a nuisance. Accordingly, I order that Mr. Talsky and any occupants and or guest in his unit cease all smoking activities in the unit. Regarding the allegations against HCC 192, I find that HCC 192 has met its obligations under the Act to investigate Ms. Edwards' complaints and seek compliance with its rules and the Act. As Ms. Edwards was successful in the case, I will order Ms. Edwards reimbursed for the amount of \$200 for her Tribunal fees. As Mr. Talsky was the unsuccessful party he will pay the fee. No other costs are awarded.

B. ISSUES & ANALYSIS

Issue No. 1: Is smoke and odour from Mr. Talsky's unit unreasonable resulting a nuisance, annoyance or disruption to Ms. Edwards as per 117(2) of the Act? If so, what is the appropriate remedy?

[7] At the time of this application, HCC 192 had no rule that outright prohibited smoking in individual units. The only rules related to smoking were the Smoking Rules, enacted in 2018, which placed conditions on smoking and allowed HCC 192 to address complaints about smoke and odour if it was determined that this smoke and odour was creating a nuisance.¹ The relevant sections of these rules, are as follows:

4. Permitted Tobacco Smoking Areas: Tobacco use or tobacco smoking is only permitted in a Unit provided that:

a) The tobacco use or tobacco smoking is entirely contained in the Unit:

b) All windows and exterior doors to the Unit are in a closed position when smoking tobacco in a Unit:

c) The exhaust fans in the Unit are turned on when smoking tobacco in the Unit; and,

d) air filters end/or purifiers are installed to prevent second-hand smoke and odours from entering other Units or the common elements.

5. Restricted Tobacco Smoking Areas: Tobacco use and tobacco smoking are strictly prohibited on all exclusive use common elements (i.e. balconies and terraces)" in all interior common elements, including corridors, stairwells, and garage, and all exterior common elements, including the interior roadway, parking areas walkways, lawn, and other exterior common element amenities or areas.

...

7. Unreasonable Interference and Nuisance:

a) No Owner or Occupant of a Unit and no guest of a Unit shall permit the transmission of any smoke or odour from any tobacco substance to any other Unit or to the common elements, including the exclusive use common elements.

b) If the board of directors determines, in its discretion, acting reasonably, that any tobacco smoke or tobacco odour is being transmitted to another Unit (regardless of whether or not the Unit is adjacent to the offending Unit), and that the transmission of such smoke or odour is an unreasonable nuisance or unreasonably interferes with the use or enjoyment of another Unit or the common elements, then the Owner of the offending Unit shall take all steps that the board of directors deems necessary to eliminate or abate the nuisance or interference within the timeframe to be established by the board of directors at such Owner's sole cost and expense. Such steps may include, but are not limited to, the installation of additional exhaust fans with smoke sensitive automatic controls and the entering into an alteration agreement in accordance with s. 98 of the Act (if alterations to the common elements are required). Any associated costs will be the sole responsibility of the Owner.

c) Further, if in the opinion of the board of directors, in its discretion acting reasonably, an unreasonable nuisance or unreasonable interference continues after the timeframe set out to correct the nuisance or interference, notwithstanding any steps taken by the Owner to eliminate such nuisance then the board of directors may:

(i) Undertake such abatement measures that it deems necessary in the circumstances and the Owner of the offending unit shall be liable to Corporation for all costs and expenses, including professional costs and expenses and legal costs and expenses on a full indemnity, basis incurred by the Corporation in abating the transmission of such tobacco smoke or odour: and/or.

(ii) Require that the tobacco smoker or user in the offending Unit immediately and permanently cease the use or smoking of tobacco in the Unit.

...

- [8] Although HCC 192 has no rule prohibiting smoking in units, Ms. Edwards maintains that the smoking in Mr. Talsky's unit is causing a nuisance in the form of unreasonable smoke and smoke odour and thus should be prohibited under s. 117(2) (b) of the Act, which reads:

(2) No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,

(a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or

(b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation. 2015, c. 28, Sched. 1, s. 102.

- [9] The other "prescribed" nuisances, annoyances, and disruptions are set out in Ontario Regulation 48/01 s. 26 ("O. Reg 48/01") and include smoke and odour.
- [10] As noted in the introduction, there is no dispute that frequent smoking occurs in Mr. Talsky's unit, and the evidence is that there is a long history of complaints regarding smoke odour emanating from his unit. According to evidence these complaints date back as far as 2013, when Mr. Talsky received the first of several letters from HCC 192 notifying him of complaints about cigarette smoke and odour coming from his unit.
- [11] Mr. Talsky acknowledges that between 2013 to 2017 he received approximately one letter per year from HCC 192 regarding smoke and odour complaints about his unit. However, Mr. Talsky argues that he has taken extensive measures, as requested by HCC 192 and in accordance with the Smoking Rules, to ensure that the smoke from his unit does not migrate into Ms. Edwards unit or the common elements. These measures include running three HEPA air filters continuously, keeping the windows and doors to his unit closed (at all times) and turning on the exhaust fans in the unit when smoking. He also testified that he has cooperated with all HCC 192's attempts to investigate the issue (I will address these attempts in more detail further in this decision). Finally, he notes that between 2017 and 2023, he received no further letters from HCC 192 regarding smoking complaints and it was only in the Spring of 2023 that he became aware that the complaints about smoke from his unit had begun again. He testified that due to the lack of letters between 2017-2023, he assumed the problem had been resolved.

- [12] According to Ms. Edwards, this break in letters of complaint could be accounted for in several ways. She testified that while she had been complaining about the smoke and odour from Mr. Talsky's unit for years, there would be periods where, after making several complaints, the smoke would abate then pick up in earnest again. The periods of abatement may account for some of the gaps in the complaints. She further testified that between 2018 and 2022, HCC 192 had a high turnover of condominium managers, meaning each time a new one arrived she would try to have them address her complaints, but then they would leave, forcing her to begin the process all over again. According to Ms. Edwards, this led to little action or traction on her complaints during these years. She also notes that in 2018, shortly after the Smoking Rules were adopted, Mr. Talsky was elected to the board of directors where he remained as a director until 2024. She suggests that his presence on the board during this time also contributed to the failure of HCC 192 to act on her complaints during this period. However, this point is speculative, and I give it little weight. Importantly, Ms. Edwards notes, that even though her complaints were not, in her opinion, adequately resolved or addressed, up until 2023, there was no dispute over the fact that Mr. Talsky's unit was the source of the smoke. It is only in 2023, when this dispute began to escalate, that doubt was cast on the source of the smoke.
- [13] The evidence appears to support this claim. As early as 2016, the evidence shows that HCC 192 was investigating the complaints of smoke and odour migration and these investigations appear to be focused on how to resolve the issue of smoke and odour migration from Mr. Talsky's unit to Ms. Edwards unit, *not* on determining if there was smoke and odour or where it was coming from. In fact, in a letter sent to Ms. Edwards in 2016, HCC 192 notes that they have instructed the residents of the "suite in question" (which was Mr. Talsky's unit) to run their exhaust fans 24 hours a day to help expel the smoke and had convinced them to purchase air purifiers (which Mr. Talsky confirms he did).
- [14] Additionally, the board itself, right up until the latter part of 2023, appeared to have been satisfied that the smoke was coming from Mr. Talsky's unit. In July 2023 it informed Mr. Talsky in a letter that it had "received multiple complaints with respect to various and recurring smells of smoke emanating from your unit into the common hallway and neighbouring units" and stated that "this has been an ongoing issue for many years". The letter went on to advise that the board had determined the smoke, and odour disturbed the enjoyment of other owners in violation of its rules, and thus the board had decided to enforce s. 7 c (ii) of the Smoking Rules and prohibit Mr. Talsky and any occupant of the unit from smoking in his unit.
- [15] A former member of the board, Gerald Chopiany, who served on the board of

directors between October 2017 – July 2024 (which includes the same period as Mr. Talsky) testified that this letter was sent to Mr. Talsky after the board came to the decision in July of 2023 that Mr. Talsky's smoking was "interfering with the enjoyment of other units". This decision is reflected in the board minutes of July 5, 2023, which were submitted into evidence. Mr. Chopiany also testified that he personally investigated several of the complaints about smoke and odour coming from Mr. Talsky's unit by visiting the hallway of the unit himself or with others (including, at different times, another board member and the condominium manager Joanne Simpson) and found that the odours varied in intensity during his investigations, but that it was clear that Mr. Talsky's unit was the major source of the smoke on the 5th floor.

- [16] What changed in 2023? It appears that what changed was HCC 192's decision to enforce its Smoking Rules, which as noted earlier, allow the board to prohibit smoking in a unit if it is determined to be a nuisance that disturbs the enjoyment of others. This decision appears to have prompted Mr. Talsky to take the position that his unit was not the source, a position he maintains in this case.

Is Mr. Talsky's unit the source of the smoke and the odour complained of by Ms. Edwards?

- [17] In support of his position that his unit is not the source of the smoke, Mr. Talsky relies on the following evidence. First, the fact that over the years, smoke and odour have been an issue on both the 4th and 5th floors and HCC 192 has acknowledged problem with odour transmission. He points to several general notices from the board that were circulated on both the 4th and 5th floors regarding smoke and odour as proof of this. I do not find the evidence or arguments on this point persuasive. While I accept that there may be an issue on other floors with smoke and odour, and that HCC 192 may have issued some general notices regarding it, this does not mean that Mr. Talsky's unit is not the source or primary source of the smoke and odour being complained of by Ms. Edwards.
- [18] Second, Mr. Talsky relies on the fact that between 2018-2023 he received no official letters from the board regarding complaints about smoke in his unit. I accept this as true. However, I am not persuaded that this means that there were no complaints about his unit during this period, only that HCC 192 did not issue any letters directly to him about the complaints. John Cochrane, who owns a unit near Mr. Talsky's, testified that for three years (since approximately 2020) he had been making complaints about the smoke and odour coming specifically from Mr. Talsky's unit, and that he has spoken directly to Ms. Simpson about it during her tenure as condominium manager on several occasions. Another immediate

neighbour of Mr. Talsky's, Dorthy Nicolson, gave similar testimony, testifying that she had been actively complaining of the smoke odour from Mr. Talsky's unit for years. Ms. Edwards also testified that she made several complaints during the intervening years, but that due to condominium manager turnover, the complaints seemed to go nowhere. So, while, I accept that during these years, Mr. Talsky may not have been directly notified by letter of these complaints as he had been in the past, I do not find it amounts to proof that there were no complaints and that Mr. Talsky's unit is not the source of the smoke and odour Ms. Edwards complains of now.

[19] Third, Mr. Talsky relies on the evidence that Ms. Edwards and other residents of the 5th floor continued to complain of smoke and odour for a period of approximately 2.5 months between December 10, 2023, and February 29, 2024, when he and his wife were away. Having reviewed the complaints that were submitted into evidence and dated as being made during Mr. Talsky's absence, I note that the majority of the complaints during this period do not cite fresh smoke smell, but "residual cigarette odours" and "third hand smoke odors¹". Ms. Edwards also testified that what she smelled during these dates was an "offensive odour". There is a reasonably well-established common understanding that smoke odours, particularly from long-term or substantial use of cigarette or similar tobacco products, may remain detectable for significant periods of time after the actual source of the smoke has been extinguished. Thus, it is not unreasonable to accept that after many years of regular and persistent smoking in a unit, that odour may linger and that complaints about smoke odour may continue in absence of real time smoking. I also note that at least one complaint submitted during this period notes that during Mr. Talsky's absence the smoke smell improved considerably, lending weight to the fact that Mr. Talsky's unit is the source of the smoke and odour as it abated during his absence.

[20] In response to the many complaints received and the witness testimony provided, Mr. Talsky asserts that a group of residents – which includes Ms. Edwards, Ms. Nicolson, and Mr. Cochrane - have been conspiring against him in an attempt to help them gather support for introducing non-smoking rules to the building. And, while some of the complaints provided do suggest that some residents, including Ms. Edwards, Ms. Nicolson and Mr. Cochrane, support the implementation of non-smoking rules, I am not convinced that this support discredits the testimony they provided here. It is possible that each person's experience with smoke and odour on the 5th floor may very well be informing their position on HCC 192's rules in

¹ Third hand smoke is a term used to refer to the residual Tobacco smoke pollutants that can settled onto surfaces like carpets, clothing, walls, etc.

relation to smoking, but this does not diminish the credibility of their evidence. Moreover, Ms. Simpson, as the condominium manager, who has no 'stake' in the status of the building as smoking or non-smoking, testified on cross-examination that she had visited Mr. Talsky's unit and had informed him that she detected smoke odour that was causing a disturbance to other units.

- [21] Finally, Mr. Talsky relies on a Smoke Migration Diagnostic Testing ("FCS Report"), issued after Fire Consulting Services ("FCS") undertook testing to evaluate the smoke and fire separations between Mr. Talsky's unit, Ms. Edwards' unit and other adjacent units. The report concluded that the test showed no direct smoke migration between Mr. Talsky and Ms. Edwards units through the fire separations and there was minor smoke migration from Mr. Talsky's unit into the hallways, under specific conditions, namely when the unit door is open, and the windows are closed.
- [22] A great deal of evidence by all parties was submitted on this test, some of it including a letter of opinion from Pretium Engineering Inc., commissioned by Ms. Edwards, which calls into question the methodology used by FCS and concludes that the "methodology for testing was limited in details and scope" and thus, the results "cannot definitively conclude that there is no smoke odour migration issues either between the units or into the corridor." I have reviewed, in detail, all the evidence provided in relation to the FCS test and report, including the statements provided by the engineers of both the report and letter of opinion. I prefer the evidence as presented by FCS and give it greater weight because they, in fact, did the testing.
- [23] Nonetheless, even if I accept the conclusion in the FCS report that there was no direct smoke transferring between units via the fire separations and there is minor smoke migration into the hallways (under the conditions noted above), the testing, which involved releasing artificial smoke into the unit to observe its migration path, took place over a 10-minute period. Given the fact that, in this case, Mr. Talsky's wife smokes 15 cigarettes a day and has since she moved into the building in 2012, even limited migration could reasonably be expected to result in smoke odour, which is distinct from smoke, accumulating over time in the hallways and infiltrating other units.
- [24] Further, I note that the purpose of the test was to learn if there was any direct smoke transfer between the fire separations between the units and is largely silent on the question of smoke odour. However, the report appears to acknowledge that there may be other ways (beyond what was tested) that smoke and odour, in particular, could be transferring between units, i.e. through the hallways or exhaust

ports. Under proposed next steps, for example, the FSC report reads:

To address the issues of smoke migrating throughout the hallways, FCS suggests you contact your HVAC company to help correct this problem by increasing the volume of air from the makeup air units.

Two exhaust ports are located on the balcony area of unit 501 & 502. FCS suggests your HVAC company to confirm the one-way flap is present and prevents outside air from transferring into the unit. This will also help reduce outside cigarette odour migrating into the unit.

- [25] These proposed next steps align with Ms. Edwards' beliefs expressed in her letter to HCC 192 in October of 2023 sent before the FCS test. In that letter, she indicated that she believed the proposed testing was designed to investigate a "problem that we believe does not exist, i.e. smoking passing directly through units between gaps and the wall". Rather, their letter indicated that after having lived with the problem for many years they believed the smoke and smoke odour was migrating into their unit from Mr. Talsky's via the hallway, windows (on occasion) and the exhaust vents.
- [26] Finally, the FCS report alone, is not the sole piece of evidence before me. As detailed, there are several years' worth of complaints about smoke and odour emanating from Mr. Talsky's unit, not all of which are from Ms. Edwards. Witness testimony from two other resident owners with units close to Mr. Talsky's testified that smoke and odour frequently emanate from Mr. Talsky's unit into the hallways (and often their own units) and that they have been making formal complaints about this for years. There is also the testimony of Ms. Simpson who indicated she investigated and informed Mr. Talsky that she could detect smoke odour emanating from his unit; and the testimony of Mr. Chopainy, who testified that on several occasions he investigated the complaints about Mr. Talsky's unit on behalf of the board (with others present), by visiting outside of Mr. Talsky's unit and determined, based on these visits, that Mr. Talsky's unit is the cause of the smoke and odour. Further, there is no question that there is regular and frequent smoking in Mr. Talsky's unit. For many years there seemed to be no dispute over where the smoke and odour was coming from, only questions on how to minimize the impact of it. It was only after the board decided to enforce its Smoking Rules that Mr. Talsky began to deny the smoke and odour were coming from his unit.
- [27] Based on the totality of evidence, I find that it is more likely than not that the smoke and odour experienced and complained of by Ms. Edwards, is coming from Mr. Talsky's unit.

Is the smoke and/or smoke odour from Mr. Talsky's unit unreasonable and does it

constitute a nuisance?

[28] Having concluded that Mr. Talsky's unit is likely the source of smoke and smoke odour experienced and complained of by Ms. Edwards, I must decide if it is unreasonable and if it constitutes a nuisance as per s. 117(2) of the Act. The Tribunal has been consistent in its analysis of what constitutes a nuisance as per the Act. Namely, the alleged activity must substantially and unreasonably interfere with an owners use and enjoyment of their unit or the common elements². Factors, such as the frequency of the inference, its duration, and the distinct aspects of the condominium community may all be considered in determining whether something is a nuisance pursuant to s. 117(2) of the Act.

[29] While, as argued by Mr. Talsky, it may not be reasonable in a building that allows smoke for residents to expect no smoke or odour, in this case the evidence shows that the smoke odour experienced by Ms. Edwards exceeds the level of tolerance that a reasonable person may be expected to have, even in a building that does not prohibit smoking. I find the evidence on this point clear and credible. Complaints have been made about the strong smoking odour from Mr. Talsky unit for over 10 years. Aside from Ms. Edwards' well documented complaints and logs detailing the frequency of the smoke odour (which is, for the most part, daily), the unit owners of two different units near Mr. Talsky's unit have also, for years, made clear and continuing complaints about the persistent smoke odour from Mr. Talsky's unit. Mr. Cochrane, described the effects of this odour as "devastating" and "intolerable" and causing "unliveable circumstances on the 5th floor", and Ms. Nicolson has repeatedly complained of "strong odour" or "noxious odour" that has caused her distress and affected her health. She testified that that she has often avoided inviting guests to her home because of the smoke odour. Additionally, Mr. Chopainy, who investigated some of the complaints on behalf of the board, described on at least one occasion the smoke outside of Mr. Talsky's unit as "horrific". And, while this case is not about whether other residents who are not parties to this application, such as Mr. Cochrane and Ms. Nicolson, are experiencing smoke migration or odour in their units – a point on which I make no finding – the evidence from these witnesses is corroborative of Ms. Edwards' evidence. It supports the finding that smoke odour from Mr. Talsky's unit has been persistent for over 10 years, is frequent, strong and more than a trivial interference.

[30] These facts, among others, make this case different from those referred to me by

² See for example *Kovalenko v. Romanino et al.*, 2024 ONCAT 151 and *D. Souza v. Toronto Standard Condominium Corporation No. 2565 et. al.*, 2024 ONCAT 23.

Mr. Talsky's counsel, namely *Kovalenko v. Romanino et al.*, 2024 ONCAT 151 ("Kovalenko") and *Parachuk v. Karakoc*, 2023 ONCAT 198 ("Parachuk"), in which the Tribunal concluded that smoke and odour ought to be reasonably tolerated by residents when they live in buildings that do not prohibit smoking.

- [31] In *Kovalenko*, while the Tribunal did conclude that three to four instances of smoking per day did not constitute a nuisance, in that case, the smoking was taking place outdoors. The applicant who complained of the smoke had the option to close their windows and patio door during these smoking events since the smoke was only migrating through open windows and doors. In this case, the frequency of the smoking is much greater, and Ms. Edwards does not have the same option to simply close her windows or doors to abate the odour as the migration is coming from smoking inside the building (likely via the hallways and exhaust vents)
- [32] In *Parachuk*, while the Tribunal also concluded that the smoke odour events logged by the applicant at upwards of 15 times a day was not unreasonable in a building that allowed smoking, the Tribunal also noted that there was no independent evidence that could verify the smoke and odour complained by the applicant. For instance, security staff could not smell smoke when investigating her complaints, and while others in the building submitted statements about odour, only one identified smoke as the odour they were experiencing. The facts in this case are very different. There is significant independent evidence to support Ms. Edwards' claims of unreasonable smoke odour in the form of detailed, consistent, and specific complaints by other residents, complaints that have been at various times verified by a board member or the condominium manager. Additionally, in *Parachuk*, the facts suggested that the applicant may have had a heightened sensitivity to smoke, but there is no evidence that this is true of Ms. Edwards.
- [33] So, while I accept that Mr. Talsky has taken the measures asked of him to reduce the effects of the smoke and odour on his neighbours, including purchasing air filters, keeping his windows closed and running his exhaust fan, these measures have not effectively mitigated the smoke odour caused by his wife's frequent smoking. Regardless of whether a building prohibits smoking or not, s. 117(2) (b) of the Act, which HCC 192 is required to enforce, and Mr. Talsky is required to comply with, prohibits any activity or the continuation of an activity that results in the creation or continuation of a nuisance in the form of smoke and/or odour. In this case, I am persuaded the evidence establishes that a reasonable person viewing the matter realistically and practically would conclude the smoking in Mr. Talsky's unit is causing unreasonable odour that is substantially interfering with Ms. Edwards' use and enjoyment of her unit and the common elements (the

hallways).

- [34] Finally, Ms. Edwards also submitted that Mr. Talsky had been using an air freshener in his unit to combat the smoke odour and that this air freshener was also causing a nuisance in the form of unreasonable odour. While Mr. Talsky may be using an air freshener, I find that I do not have sufficient evidence before me to make a finding on this issue. The evidence before me, which is limited compared to the evidence on the smoke odour, suggests that there may be some air freshener odour experienced by Ms. Edwards, but it is unclear whether that odour is from Mr. Talsky's unit and I am not convinced even if it is, in this case it is unreasonable or amounts to a nuisance.

Issue no. 2: Has HCC 192 fulfilled its obligations under the Act in its response to the concerns expressed by Applicant about nuisance smoke and odors?

- [35] Under s. 17(3) of the Act, HCC 192 has a duty to:

take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

- [36] Under s. 119(3) of the Act:

A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require that a person who is required to comply with this Act, the declaration, the by-laws and the rules shall do so.

- [37] Ms. Edwards argues that HCC 192 has failed to fulfill its obligations under the Act. She asserts that between 2012 and 2023, HCC 192 was convinced that Mr. Talsky was the source of smoke and odour yet, even though HCC 192 had the tools to address the nuisance beginning in 2018 when its own Smoking Rules were introduced, and/or via the Tribunal when s. 117(2) came into force in 2022, it failed to do so. She questions whether Mr. Talsky's joining of the board in 2018 contributed to the board failing to take actions to address the smoking.
- [38] According to the evidence, HCC 192 acknowledged Ms. Edwards' complaints from the outset. In response to these complaints, in the years between 2012 – 2017, HCC 192 took several actions to both investigate and address them. As noted in this decision, HCC 192 spoke on several occasions to Mr. Talsky about the smoke and odour, they asked him to purchase air filters and sent him several letters about the complaints. HCC 192 also took other actions, including repairing the make-up air units ("MAUs") which are responsible for pressurizing the air in the hallways,

installing weather stripping on the door of the suite that was the source of the smoke (i.e., Mr. Talsky's unit) and engaging a consulting firm to test the air quality in the hallways. These actions were detailed in the aforementioned letter that HCC 192 sent to Ms. Edwards in 2016.

- [39] It also appears that in 2017/2018, HCC 192 sought to conduct what they called more "intrusive" investigation in smoke and odour migration by proposing a similar test (although not identical) to the test that was eventually conducted by FCS in 2023. The evidence shows that Ms. Edwards declined to participate in this test for two reasons: one, at the time the smoke smell had abated, and she wanted to wait to see if the relief was permanent; and, two the test proposed would have required cutting holes in the drywall of the unit and she would have been responsible for the cost of repair. Upon being notified of Ms. Edwards' decision to forgo the test, HCC 192 wrote to Ms. Edwards to encourage her to reconsider, given that less intrusive measures of investigation and solutions (such as the air purifiers) were not solving the problem.
- [40] As noted previously in this decision, after 2018, there is little action taken in this matter until it escalated again in 2023. However, during this period, HCC 192 did send out several general notices to residents reminding them to take steps to minimize smoke and odour migration into other units or the common elements by using their exhaust fans, keeping windows closed, and reminding them of the new Smoking Rules which were introduced in 2018.
- [41] In 2023, HCC 192 took further action, which once again focused specifically on Mr. Talsky's unit. The condominium manager, Ms. Simpson testified that she spoke to Mr. Talsky on several occasions about the complaints against his unit, and on a visit to his unit noted that his air filters were functioning. Then in July 2023, after reviewing the communications from Ms. Edwards, the many complaints received over the years and the steps previously taken to address the smoke and odour from Mr. Talsky's unit, the board concluded that the only action remaining was to invoke the nuisance provisions in its Smoking Rules and did so. However, no enforcement action was ever taken. Shortly after making this decision, as noted, Mr. Talsky challenged the board's decision, threatened legal action, and this application was filed by Ms. Edwards.
- [42] Once this application was filed, several more actions were taken. As discussed above, HCC 192 contracted FSC to perform a test to see if any smoke was

migrating through the fire separations of Ms. Edwards' and Mr. Talsky's units³. The evidence also shows that in March of 2024, HCC 192 hired Edison Engineering to conduct a test of the MAUs to ensure proper functioning. No deficiencies were identified.

[43] I do agree with Ms. Edwards that it is curious that prior to Mr. Talsky being elected to the board, HCC 192 was, by all accounts, firm in its belief that Mr. Talsky's unit was the source of the smoke and odour and acted accordingly, and that this belief and those actions seemed to cease when Mr. Talsky joined the board. However, as detailed above, the evidence shows that HCC 192 did take significant action, over many years, at its own expense to address Ms. Edwards' concerns and enforce its rules. And, while I acknowledge that it may seem like a single letter from Mr. Talsky's counsel claiming that his unit was not the source of the smoke should not have been enough to discount ten years' worth of complaints and other evidence as to the origin of the smoke and odour, I accept that when the board chose to seek more independent evidence in the form of expert testing before taking further action, it acted within a range of reasonable possibilities in response to Mr. Talsky's letter. While not all the actions taken over the many years have accorded with Ms. Edwards' own view of what should be done, as well as when and how, that is not the standard by which reasonable actions are evaluated. Based on the evidence before me, I cannot conclude that HCC 192 did not meet its obligations under the Act.

Issue No. 3 & Issue No. 4: If the smoke and odour is found to be a nuisance, what is the appropriate remedy? Should HCC 192 be required to enforce Rule 7(c) ii of the Tobacco Restriction and Nuisance Rules of the Condominium against Mr. Talsky?

[44] By all accounts, this may be a problem without a good solution. The evidence appears to suggest that there may not be a structural repair or mechanical solution to this problem. Many of these types of solutions (e.g. the use of air filters in the Mr. Talsky's unit, experiments with circulating air fresheners via the MAUs to dampen the odour, etc.) have been investigated and attempted, to no avail (and some, like the forced air fresher solution, caused more problems rather than relief). Additionally, to date, there is no evidence of any malfunctioning of the building's air or exhaust systems which might exacerbate the issue. I also recognize that due to Mr. Talsky's wife's personal circumstances, she may not be able to quit smoking.

³ I note that while the FCS test was conducted during the Mediation stage of the Tribunal process which began in November 2023, the evidence demonstrates that HCC 192 began inquiring into such a test several months prior – in August of 2023.

However, the Act is clear: no person may carry on an activity or permit an activity to be carried on in a unit if it results in the creation or continuation of a nuisance. I have found in this case the smoking taking place in Mr. Talsky's unit is causing unreasonable odour that is a nuisance, and it cannot continue.

- [45] Ms. Edwards has asked that I order HCC 192 to enforce its Smoking Rule 7(c) ii against Mr. Talsky, which would require him and any occupant or guest to cease smoking in his unit if smoke and odour from his unit were found to be causing a nuisance. However, as noted earlier in this decision, the building's Smoking Rules may be in flux. This matters only insofar as I do not wish to order the enforcement of a rule that may no longer exist. However, having found that the smoking in Mr. Talsky's unit is causing a nuisance, I do not need to rely on HCC 192's rules to make an order that smoking cease in Mr. Talsky's unit. Under 1. 44 (1) 2 of the Act, the Tribunal can make an order "prohibiting a party to the proceeding from taking a particular action or requiring a party to the proceeding to take a particular action." In the absence of any evidence there is another tenable solution, I will order that Mr. Talsky, and any other residents of his unit permanently cease smoking in his unit. Recognizing that Mr. Talsky's wife's personal circumstances may make her unable or unwilling to quit smoking at an advanced age, I will provide a period of 30 days before the order takes effect to allow for Mr. Talsky and his wife time to consider how they will abide by this order.

Issue No. 5: Is any party entitled to costs? If so, in what amount?

- [46] The cost-related rules of the Tribunal's Rules of practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise. Reimbursement of Legal Costs and Disbursements at any stage

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

- [47] The Tribunal's "Practice Direction: Approach to Ordering Costs" provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential

impact an order for costs would have on the parties; the indemnification provisions in a corporations governing documents, and whether the parties attempted to resolve the issues in dispute before the CAT case was filed.

[48] As Ms. Edwards was successful in this case. As Mr. Talsky is the unsuccessful party, I will order he reimburse for her Tribunal fees in the amount of \$200.

[49] Regarding legal costs, all parties requested legal costs in this matter.

[50] As Mr. Talsky was not successful in this case, he is not entitled to any costs.

[51] HCC 192 argues it is entitled to costs because Ms. Edwards refused several offers of investigation and testing proposed by HCC 192, and that Ms. Edwards' claim was "unsupported by evidence". I find these arguments thin at best, particularly the assertion that Ms. Edwards has proceeded with this complaint with no evidence because the FCS Report concluded there was not smoke travelling between the fire separations. While the FCS Report may have eliminated one possibility for the path of smoke migration, as noted in this decision, there is ample other evidence as to source of the smoke and smoke odour, much of which HCC 192 was aware of, for many years appeared to agree with, and appears to have relied on when deciding that it should invoke its Smoking Rules against Mr. Talsky in 2023. The evidence does show that while Ms. Edwards did decline an investigation in 2018, she did participate the FCS testing, even though she was skeptical. In this case I have found Ms. Edwards' claim to have merit, and I am not persuaded that failing to submit to one proposed investigation in 2018 entitles HCC 192 to costs. I find there is no reason to award any costs to HCC 192.

[52] Finally, Ms. Edwards has requested that HCC 192 pay \$5000 in costs and the amount of the Pretium Engineering report and subsequent opinions commissioned by her to dispute the results of the FCS Report. Ms. Edwards argues HCC 192 should have sought this advice itself instead of forcing her to obtain it. Additionally, Ms. Edwards argues that throughout this proceeding HCC 192 was uncooperative, insofar as they would not speak with her about the issues, required her to pay for building drawings instead of simply producing them, and subjected her to mockery by allowing Mr. Talsky who remained on the board at the time, to read confidential Tribunal documents at a meeting of owners, although there was no conclusive evidence provided on this point.

[53] This is a case where each party felt strongly about their position and faced costs in advancing it. However, I have found that HCC 192 acted reasonably and met its obligations to investigate the complaints. I cannot conclude, as Ms. Edwards does, that HCC 192 should have sought additional expert reports or advice after

receiving the results of the FCS test and should now pay for that advice. Moreover, although I have found that smoking in Mr. Talsky's unit is causing a nuisance in the form of smoke odour, given the long history of the dispute, the animosity, and the fact that the building allowed smoking, which can, in some cases, make the determination of smoke odour nuisance more complicated, this case likely did require a Tribunal decision. And, while HCC 192's complete reversal of their 2023 belief that Mr. Talsky's unit was the source of the smoke and odour and the way they approached this process, is no doubt frustrating and disheartening to Ms. Edwards, it is not in and of itself grounds for an order of costs.

[54] Given that in this case there was not any unreasonable behaviour by HCC 192 (or any party) in this hearing that caused unnecessary delay or additional expense, I see no reason to make a costs order against HCC 192. Ms. Edwards will need to bear her own costs. No order for costs will be made.

C. ORDER

[55] The Tribunal Orders that:

1. In 30 days from the date of this decision, under s. 1.44 (1) 2 of the Act, I order Mr. Talsky and any other residents or guests to his unit to cease all smoking in his unit.
2. Within 30 days of the date of this decision, Mr. Talsky shall pay Ms. Edwards \$200 to reimburse her for her Tribunal fees.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: November 27, 2024